IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

NO. _____

CLIFFORD D. PIERCE, JR., Administrator,	]
Complainant,	]
VS	]
RUTH LIDDELL THARP, et al,	]
Defendants.	]

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

C. M. Murphy, on behalf of his client, Mrs. Frankie Tharp McKown, and on behalf of himself, prays a writ of certiorari to review the judgment of the highest court of the State of Tennessee, the Supreme Court of Tennessee sitting at Jackson, Tennessee, entered in the above case on December 7th, 1970.

OPINION BELOW

The opinion of the Supreme Court of Tennessee, dated December 7, 1970, has not yet been published. It is copied verbatim in the appendix hereto, on page 1a.

JURISDICTION

The judgment of the Supreme Court of Tennessee, upon the aforementioned opinion, was made and entered on December 7th, 1970, and a copy thereof is appended to this petition in the Appendix, at page 1a. The jurisdiction of this Court is invoked under 28 USC 1257 (3).

QUESTIONS PRESENTED

After the issues raised in the civil case in question had twice been reviewed by the intermediate appellate state court known as the Tennessee Court of Appeals, and after the highest court of Tennessee, the Tennessee Supreme Court, had refused to review the issues upon the first go around, and had granted certiorari and reviewed the remaining issues presented on the second go around, Mrs. Frankie Tharp McKown, by and through her solicitor of record, C. M. Murphy, discovered certain disturbing facts about the actions of the judges, or some of them, who decided said issues which prompted an immediate application for relief before the highest court of Tennessee, *at a time when the case still remained in the bosom of that court.*

This was a will-trust construction case. The chancellor who tried the cause, so we are informed, discussed the facts at length many times after the trial date, and before decision announced, with the author of the will-trust, who was then a criminal court judge in Memphis. After appeal and before decision, the trial chancellor was called upon to, and did, discuss the case with Judge Lois Bejach, the Court of Appeals judge who wrote the opinion. Later, when the matter was pending in the Supreme Court, that same chancellor discussed the case with Judge Hamilton Burnett, then Chief Judge of the Tennessee Supreme Court. There were other conversations between the trial chancellor and Judge Larry Creson, one of the Su-

INDEX

	PAGE
Petition For A Writ of Certiorari to the Supreme Court of the State of Tennessee	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	3
Statement	4
Reasons for Granting the Writ	6
Conclusion	10
Certificate of Service	10
Appendix	1a

CITATIONS

PAGE

Article 17, *Canon's of Judicial Ethics* 7

Chumbley vs People's Bank & Trust Co.,
165 Tenn 655, 57 SW2d 787 (1933) 9

Constitution of Tennessee, Section 11 8

Constitution of the United States,
Fourteenth Amendment, Section 1 3-5-8

Crawford vs Bounds, (CA NC 1968), 395 F2d
297, vacated on other grounds, 89 S Ct
234, 393 US 76, 21 L Ed2d 62 8

Dailey vs Warden, 3 Md App 425,
239 A2d 778 (1968) 8

Ex parte Wallace, 152 P2d 1, 24 Cal App 933 (1944) 8

Moore vs State, 118 Ohio St 487,
161 NE 532 (1928) 8

State ex rel McFerron vs Justice Court,
32 Wash2d 544, 202 P2d 927 (1949) 8

Tennessee Code Annotated, Section 17-401 7

Tennessee Code Annotated, Section 17-406 7

28 *USC* 1257 (3) 2

Winter vs Allen, 166 Tenn 281, 62 SW2d 51 (1933) 9

preme Court Judges, upon the second round of appeals. And at no time during the progress of the trial and review of the issues, were we appraised of these facts, or given an opportunity to meet the views presented to the judges who were considering the issues!

The questions presented are:

1. Whether a court which considers arguments, or statements of fact, opinions or judgments about matters material to a pending case, from one who clearly has some interest, without advising all parties to the suit and giving them an opportunity to be heard thereon, denies those parties a fair hearing within the meaning of the due process clause of the Fourteenth Amendment of the United States Constitution.

2. Whether an appellate court, which by one or more of its judges, considers views, clarifications justifications, arguments or comments as to findings of facts, from the trial court, during the pendency of the cause for review by that appellate court, denies a party a fair hearing before that court, which party has not been fully and accurately advised as to the aforementioned communication, nor given an opportunity to be heard thereon.

3. Should the Supreme Court of Tennessee, as the one body politic having supervisory jurisdiction over the administration of the judicial department of the state, have acted promptly to remedy the wrong suffered by the litigants of this suit, and ordered a new trial as to all issues before another and different chancellor.

CONSTITUTIONAL PROVISION INVOLVED

The following part of the Fourteenth Amendment of the Constitution of the United States:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This suit was originally filed by the administrator cum testamento annexo of the last will and testament of James H. Tharp, deceased, to construe that will and for directions as to whether a good and valid charitable thrust was created by the will. The parties defendant were as follows: Ruth Liddell Tharp, the wife of testator, who was mentioned in the will, but not in the trust in question; Talmage E. Mugrage and decedent were natural brothers, both illegitimate, and both adopted by different parents; Mrs. Frankie Tharp McKown, the natural daughter of parents who adopted and reared decedent; and the Attorney General was made a party to protect the interests of the unknown beneficiaries of the alleged charitable trust. Under Tennessee law, had there been no charitable trust, the residual heirs of decedent would have taken: namely, Mrs. Frankie Tharp McKown, and possibly Talmage E. Mugrage.

The case was tried in Memphis before Chancellor Charles A. Rond, sitting without a jury on June 22 and 23, 1965, after which the case was taken under advisement. On October 12, 1966, nearly sixteen months later, the Chancellor issued a written opinion upholding the trust, and a final decree was entered on November 18, 1966.

The decree of the Chancery Court was duly appealed to the Tennessee Court of Appeals, the next highest appellate court. In due course, after briefs for all parties were prepared and filed, the case was argued before the Court of Appeals on the 29th day of June 1967. Judge Lois Bejach, of Memphis, was the judge selected by the three-judge court to write the opinion. Later, on December 14, 1967, the opinion was filed which affirmed, for our purposes, the lower court, and a judgment entered thereon on the 10th day of January 1968. A petition for a writ of certiorari was filed on the 1st day of April 1968 in the Supreme Court of Tennessee, asking that both lower court decisions be reviewed and reversed. On or about the 5th day of July 1968, we were notified by post card that our petition was denied, no reason having been given.

Thereafter, when the cause had been remanded back to the trial court, the undersigned solicitor for Mrs. McKown (along with Mr. Mugrage's solicitor) applied to the Chancellor for a solicitor's fee and expenses incurred to prepare and try the suit. These applications were denied by Chancellor Rond, and our prayer for appeals were also denied. We then petitioned the Tennessee Court of Appeals for certiorari on the 9th day of December 1968, the writ was granted, and the cause reversed and remanded to the trial court with directions to fix the fees and expenses we were entitled to. Before this case was argued on March 19, 1969, Judge Bejach had retired from the Court of Appeals, and the senior judge had also retired. The administrator cum testamento annexo, who supposedly had no interest in the outcome of the litigation then applied to the Supreme Court of Tennessee to review the decision of the Court of Appeals. Certiorari was granted, the cause argued before the Tennessee Supreme Court on April 6, 1970, and on the 18th day of May 1970, an opinion was published by that Court which reversed the decree of the Court of Appeals and affirmed the decree of the Chancellor.

A petition to rehear that decision was filed, and on August 17, 1970, the Supreme Court published another opinion denying our petition to rehear. Thus it was that when the cause was apparently entirely dead, the information as to the activities and actions of the several key judges came to the undersigned.

Immediately thereafter, on the 3rd day of September 1970, and before the cause had been remanded back to the Shelby County Chancery Court, the undersigned filed a motion with the Tennessee Supreme Court praying that all judgments of all courts theretofore entered be set aside and a new trial granted as to all issues, because the actions of those state judges effectively deprived Mrs. McKown and the undersigned of their property, without due process of law, as guaranteed by the Fourteenth Amendment, Section 1, Constitution of the United States.

The fact that Chancellor Rond conferred many times during the lengthy period he had the cause under advisement, with his fellow member of the judiciary, Judge Preston Battle, who was

the author of the controversial will, so taints the results that no decree rendered under such circumstances ought to be allowed to stand. The same thing obtains as to the first Court of Appeals decision, because of the conversations between Judge Bejach, the author, and Chancellor Rond. Then, when the Supreme Court was considering our application for certiorari, Chancellor Rond conferred at length about the case with Judge Hamilton Burnett, then Chief Judge of the Tennessee Supreme Court. On the next go around, re solicitor fees and expenses, Chancellor Rond's decision against us was reversed by a three-judge Court of Appeals. But then, Chancellor Rond conferred about the matter with Justice Larry Creson of the Tennessee Supreme Court (who is a resident of Memphis), and the Court of Appeals was reversed.

A copy of our Motion to Vacate all Decrees etc. is attached to the Appendix, as is the opinion of the Tennessee Supreme Court dismissing the motion, which was rendered on the 7th day of December 1970.

REASONS FOR GRANTING THE WRIT

Apparently, members of the judiciary, like members of the bar and any citizen, may develop habits of behavior which result in an unfair application of the due process of law to litigants before him. It is understandable and maybe even commendable that a busy judge will seek the counsel and advice of another judge (or even a lawyer) upon a point of law about which he happens to be uninformed. But there is a very real danger here. Suppose the uninformed judge should unduly emphasize some fact; or, suppose he neglected to include all the facts; or, suppose the discussion with the informant does not consider other points of law involved. What, then, is the worth of the advice received? Are the facts and law on behalf of all parties properly presented?

It is emphasized here that Chancellor Rond not only applied the law to the facts presented, he was the sole judge of the facts. There was no jury. He heard all the evidence which all the parties desired to present, bearing upon the construction of a trust set up in the will. This was no will contest suit; it

was brought principally to determine whether the residuary trust set up in the will was a valid charitable trust. Upon one of the issues involved, the chancellor allowed one of decedent's attorneys to testify as to the intent of decedent with reference to an ante-nuptial agreement. On the main issue, the testimony of the author of the will was not offered. Yet, the author of that will is the very same person the chancellor conferred with about the matters in issue – and he did so many times.

This is the kind of activity condemned by Article 17 of the *Canon's of Judicial Ethics.* Section 17-406, *Tenn Code Ann.*, and the action of the Tennessee Judicial Conference (all Tennessee Judges are members per Sec. 17-401, *Tenn Code Ann*) proclaims that the Code of Judicial Ethics as promulgated by the American Bar Association, governs the official conduct of all Tennessee judges.

Section 17, *Canon's of Judicial Ethics,* provides:

> "A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for ex parte application.
>
> While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such brief presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel."

It is suggested that an appellate judge, eager to perform those supervisory tasks of judicial administration, may also acquire habits which may well result in an unfair result to a party litigant. It is one thing to confer with a trial judge about an administrative matter; it is quite another when the conversation strays to a case already decided by the lower court judge and presently under review by the appellate judge or any case he may have presided over in any inferior court. Section

11, *Constitution of Tennessee.* Is that same judge agreeing with the spirit of the state constitution when he is allowed to confer with an appellate judge, without the knowledge and consent of the parties litigant?

Impartiality in a judge or juror is indispensable to a fair trial. *Ex parte Wallace,* 152 P2d 1, 24 Cal App2D 933 (1944). A trial before a biased and prejudiced judge would constitute a denial of due process. *State ex rel McFerran vs Justice Court,* 32 Wash2D 544, 202 P2D 927 (1949). And a refusal to hear evidence of a judge's prejudice on request to remove case triable without jury was denial of due process to defendant convicted. *Moore vs State,* 118 Ohio St 487, 161 NE 532 (1928). Prejudice, bias or other basic form of predisposition on part of trier of fact results in denial of due process. *Crawford vs Bounds* (CA NC 1968), 395 F2d 297, vacated on other grounds, 89 S Ct 234, 393 US 76, 21 L Ed2d 62. Contention of bias of trial judge raises question of violation of constitutional right to "due process" guaranteed by the Fourteenth Amendment. *Dailey vs Warden,* 3 Md App 425, 239 A2d 778 (1968).

The evil pointed out herein is rooted from the trial court through the appellate courts, to the Supreme Court of Tennessee. And when the latter court not only shows no interest whatever in "cleaning house," a party litigant who suffers thereby has no place to go for relief except the Supreme Court of the United States. If the charges made be false, let the judges involved deny them. The opinion of the court in this regard, written by Special Justice W. J. Smith, attempts to defend the charges against four other judges on the basis that they are unjust, saying:

> "Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against *unjust* criticism and clamor. Canons of Professional Ethics, American Bar Association, 1. 116."

Obviously, the Tennessee Supreme Court recognizes there is a basis for the charges – Justice Creson was still a member of the Court, even though he did not participate in the decision.

It would have been a simple matter, and very effective, to have denied the truth of the charges.

The Opinion defends the judges here involved by citing a case upon the question of how much interest a judge must have in order to be disqualified. *Chumbley vs People's Bank & Trust Co.*, 165 Tenn 655, 57 SW2d 787 (1933). The Opinion neglected to point out that the *Chumbley* case went to great lengths to deny the charges made against the judges. That case also contained the following language:

> "Every litigant is entitled to the cold neutrality of an impartial court and the members of this court approach the consideration of every case conscious of that truth and burdened with anxiety to give it application."

The Supreme Court opinion further defends on the ground that the matters complained of have been waived, and cite *Winter vs Allen*, 166 Tenn 281, 62 SW2d 51 (1933). That was a case in which the parties tried the cause before an unqualified judge, and raised that issue the first time on appeal. There, the lack of qualification was known to both parties. It is elementary that a fact cannot be waived unless the waiving party knows about it.

What should the Court have done in this case? The first concern should have been to ascertain the truth of the charges. The highest court of the state has supervisory jurisdiction over all inferior courts, and therefore has inherent jurisdiction to ascertain the truth of charges that certain judges, including two members of its own court, had acted to deprive a litigant of a fair and impartial hearing. Obviously, a trial judge or chancellor would find it awkward to investigate charges against appellate judges. What body, other than the highest court, ought properly to go into these charges?

Once the truth is known to that highest court, as I believe is the fact in this case, then the Court may right the wrong obtained by remanding the cause to another trial judge for a complete new trial upon all issues.

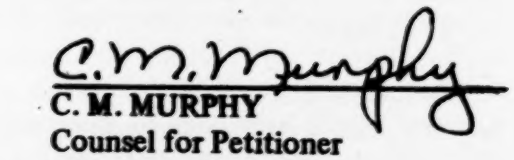
A litigant has a right to expect the trial judge, and especially a judge who is also the fact finder, to come to an honest conclusion based upon the facts presented him in open court, *and only those facts.* It is certainly a denial of due process of the law to a litigant when the judge discusses the facts or the law of a case with someone else, unless all parties have an opportunity to be present and to be heard. If we expect a juror to base his verdict upon only the evidence adduced in open court before all the litigants, we expect no less than that from a trial court which tries the case without a jury.

An appellate judge is expected to render his decision based upon the facts in the record on appeal, *and those facts alone.* It is certainly a denial of due process when the appellate judge confers with the trial judge and obtains either facts outside the record, or law which the litigant has no opportunity to meet.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED



C. M. MURPHY
Counsel for Petitioner
602 Dermon Building
Memphis, Tennessee 38103

CERTIFICATE OF SERVICE

I, C. M. Murphy, certify that I have served a copy of the foregoing Petition for Writ of Certiorari to Mr. James S. Gilliland, Suite 1325 Commerce Title Building, Memphis, Tennessee, 38103; Judge Joseph W. Evans, Shelby County Courthouse, Memphis, Tennessee, 38103; Mr. Clifford D. Pierce, Jr., Home Federal Building, Memphis, Tennessee, 38103; Mr. Phil

M. Canale, District Attorney General, Federal Office Building, Memphis, Tennessee, 38103; and The First National Bank, Trust Department, 165 Madison Avenue, Memphis, Tennessee, 38103, more than five (5) days prior to the Supreme Court, or one of the Judges thereof.

This 5th day of March 1971.

C. M. Murphy

C. M. MURPHY

APPENDIX

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

CLIFFORD D. PIERCE, JR., Administrator C.T.A. of the Estate of James H. Tharp, Deceased,

Complainant,

VS.

RUTH LIDDELL THARP, ET AL,

Defendants.

IN RE: PETITION OF C. M. MURPHY AND JOSEPH W. EVANS FOR THE ALLOWANCE OF ATTORNEY FEES.

SHELBY EQUITY,
HONORABLE CHARLES A. ROND,
CHANCELLOR.

FILED

MAY 28 1970

Jewel Redden
Acting Clerk

DECREE REVERSING COURT OF APPEALS AND AFFIRMING CHANCERY COURT OF SHELBY COUNTY

This cause came on to be heard on the record from the Chancery Court of Shelby County, Tennessee, the record and opinion of the Court of Appeals of Tennessee, Western Section, assignments of error, briefs of the parties and arguments of counsel and the entire record in this cause from all of which it appears and the Court finds that the assignment of error of Clifford D. Pierce, Jr., Administrator C.T.A., and Mrs. Ruth Liddell Tharp that the fees and expenses of the petitioning attorneys, C. M. Murphy and Joseph W. Evans could not be paid from the assets of the estate is well taken and should be sustained and that the ruling of the Court of Appeals should be reversed and that of the Chancellor affirmed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the assignment of error of the Administrator C.T.A. and of Mrs. Ruth Liddell Tharp be and the same is sustained, the decree of the Court of Appeals for the Western Section is reversed and the decree of the Chancery Court of Shelby County is reinstated and affirmed.

The costs of the appeal is taxed against C. M. Murphy and Joseph W. Evans.

APPROVED:

Attorney for Administrator C.T.A.

Attorney for Mrs. Ruth Liddell Tharp

C. M. Murphy

Joseph W. Evans

and District Attorney General

THE STATE OF TENNESSEE

I, JEWEL REDDEN, Clerk of the Supreme Court of said State for the Western Division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of

the DECREE

pronounced by said Court at its April Term, 19 70, in the case of

CLIFFORD D. PIERCE, JR., ETC. against

RUTH LIDDELL THARP, ET AL

as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in the City of Jackson, on this, the

23rd day of February A. D., 19 71

Jewel Redden Clerk

By

LAYCOCK, JACKSON, TENN.

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

CLIFFORD D. PIERCE, JR., Administrator C.T.A. of the Estate of JAMES H. THARP, Deceased,	]	
Complainant	]	
VS	]	SHELBY EQUITY
RUTH LIDDELL THARP, ET AL,	]	
Defendants.	]	

MOTION OF MRS. FRANKIE T. McKOWN AND TALMAGE E. MUGRAGE AND THEIR ATTORNEYS, FOR AN ORDER VACATING THE ORIGINAL DECREES OF THE CHANCELLOR, THE COURT OF APPEAL, AND THE SUPREME COURT

Now comes Mrs. Frankie T. McKown, her solicitor C. M. Murphy, Talmage E. Mugrage, and his solicitor, Judge Joseph W. Evans, and move the Court to set aside and vacate the original decree of the Chancellor in the original cause; to vacate the decree of the Chancellor refusing to award solicitor's fees and expenses; to vacate the decree of the Court of Appeals upon its published opinion, 58 Tenn App 362, 430 SW2d 787; to vacate the order of the Supreme Court refusing to grant certiorari to review that said published opinion of the Court of Appeals; to vacate the order of the Supreme Court granting

certiorari to review the decree of the Court of Appeals awarding solicitor's fees and expenses; and to vacate the decree of the Supreme Court reversing the Court of Appeals decree, which awarded solicitor's fees and expenses, and for cause of this motion, show the following facts and things, to-wit:

I

The controversy herein arose out of a will which was prepared for decedent by the late Judge Preston Battle, at a time before he was appointed to serve as a Shelby County Criminal Court Judge. When the case was tried before Chancellor Charles Rond, Judge Battle was a Criminal Court Judge. Prior to trial, the solicitor for Mrs. McKown asked Judge Battle to confer with him about the testator's intent with reference to the residuary trust, but he refused to do so. At the hearing, Clifford D. Pierce, Jr., the administrator, c.t.a., testified that Judge Battle did discuss the will with him. The Chancellor took the matter under advisement, and rendered his original opinion some fifteen months later. The movents herein are informed, and upon such information, believe and so charge as a fact, that Chancellor Rond and Judge Battle during the period between the filing of the

original bill, and the time of the Chancellor's original opinion, conversed with each other and talked about this will and residuary trust, out of the presence of and without the knowledge of these movents, and that the original opinion and decree of the Chancellor was based upon some of the arguments and opinions advanced by the late Judge Battle. The Constitutional rights of these movents have been violated thereby in that the Chancery Court has heard evidence and arguments which these movents were not afforded an opportunity to challenge or argue against. Art. 8 and 17, Sec. 1, Constitution of Tennessee; 14th Amendment, United States Constitution. These facts were not known to movents at any stage of these proceedings where a record thereof can be made.

II

After the original decree of the Chancellor was entered, the cause was appealed to the Court of Appeals at Jackson, the Court then being composed of Judges Bejach, Avery (both since retired), and Judge Carney. This Court of Appeals kept the case under advisement some five months after argument, before rendering an opinion, per Judge Bejach, affirming the decree of the Chancellor as to the residuary trust, but reversing to one other point decided by the Chancellor against the widow.

These movents are informed, and verily believe and so charge, that during the aforesaid five month period when the Court of Appeals had the case under advisement, Judge Bejach and Chancellor Rond did talk and converse with each other about the facts and the law of this case; that Chancellor Rond thereby became an advocate before the Court of Appeals as to the merits of his opinion and decree; and these movents were not afforded an opportunity to challenge or meet such facts and legal applications thereto. Again, movents had no opportunity to object to the Constitution of the Court of Appeals, and their constitutional rights were again violated,as aforesaid.

III

Thereafter, Mrs. McKown and Mr. Mugrage, petitioned the Supreme Court for certiorari, to review the decision of the Court of Appeals. Again, the matter rested for some time in the bosom of the Supreme Court, at a time when Judge Creson and Judge Burnett were members thereof.

These movents are informed, and verily believe and so charge as a fact, that during the time before certiorari was denied, Judge Burnett and Judge Creson talked about the

facts and the law of the case with Chancellor Rond and Judge Bejach; that thereupon, Chancellor Rond and Judge Bejach became advocates in support of the position they have already taken; and that such conversations and discussions influenced the Supreme Court to deny certiorari. All these conversations and arguments were done without the knowledge and information or consent of these movents, and operated to deprive them of their constitutional rights, as aforesaid.

IV

These movents further charge, on information and believe, which they verily believe to be true, that Judge Creson has known about and has discussed with Chancellor Rond the decision about the solicitor's fees at a time or times after the original Chancery Court decision, and before the Supreme Court decree reversing the Court of Appeals. For the reasons stated, these discussions violated the said constitutional rights of these movents, because they did not know of them, and had no opportunity to meet or argue against them.

V

Movents charge as a fact that at the time the Supreme Court first refused to grant certiorari, only two of the five members then on the Court were still on the Court when certiorari was later granted upon the issue of solicitors' fees and expenses. Upon information and belief, which these movents verily believe to believe to be true, it is charged as a fact that the two members who refused the first certiorari had become so convinced as to their conclusion of the issues, and upon facts and information and opinions not presented to this Court when the second application for certiorari was granted, that they influenced the entire Court to their opinion, two of which members were merely substitute or temporary judges, and one of which members had been appointed and had served only a few weeks. For the reasons above set out, the Court was subject to influence from facts and opinions not in the record, of which these movents had no knowledge, nor opportunity to meet, rebut or argue against, and they were deprived of their right to due process under the state and federal constitutions.

VI

Your movents now seek an opportunity to prove the allegations contained herein, by appropriate discovery procedures, and to make a complete record in the cause. Obviously, the decision upon this motion ought not to be made by this Court, as it was constituted when it rendered any decision in this cause. And until this motion has been acted upon, and the constitutional questions raised herein completely settled, all parties herein ought to remain status quo, and be enjoined not to dispose of or commit any waste as to any property in dispute.

VII

WHEREFORE, movents pray:

1. That they be given an opportunity to adduce proof in support of this motion.

2. That a hearing be set before this Court upon the issues raised herein, at such time thereafter as the orderly business of the Court shall obtain.

3. That all members of the Court who have participated in any decision in this case recuse themselves from acting upon this motion.

4. That all parties to this suit be required to remain in status quo, and be enjoined not to dispose of or to commit any waste as to any property, real or personal, involved in this suit.

5. To be allowed to present other reasons in support of this motion, if the proof so indicates.

6. And they pray for general relief.

Respectfully submitted for all four movents:

s/ C. M. Murphy
C. M. MURPHY
602 Dermon Building
Memphis, Tennessee 38103

STATE OF TENNESSEE]

COUNTY OF SHELBY]

The undersigned, C. M. Murphy, says under oath that the matters and things stated in the above motion are true, and those stated on information and belief, he verily believes to be true.

s/ C. M. Murphy
C. M. MURPHY

SWORN TO AND SUBSCRIBED before me this 3rd day of September 1970.

s/ Phyllis R. Bateman
NOTARY PUBLIC

My Commission Expires:

10-6-71

CERTIFICATE OF SERVICE

I, C. M. Murphy, certify that I have served a copy of the foregoing Motion to Mr. James S. Gilliland, Suite 1325 Commerce Title Building, Memphis, Tennessee, 38103; Judge Joseph W. Evans, Shelby County Courthouse, Memphis, Tennessee, 38103; Mr. Clifford D. Pierce, Jr., Home Federal Building, Memphis, Tennessee, 38103; Mr. Phil M. Canale, District Attorney General, Federal Office Building, Memphis, Tennessee, 38103; Eugene C. Gaerig, Assistant District Attorney General, Federal Office Building, Memphis, Tennessee, 38103; and The First National Bank of Memphis, Trust Department, 165 Madison Avenue, Memphis, Tennessee, 38103, more than five (5) days prior to the Supreme Court, or one of the Judges thereof.

This 3rd day of September 1970.

s/ C. M. Murphy
C. M. MURPHY

CLIFFORD D. PIERCE, JR., ADMINISTRATOR C.T.A. of the ESTATE OF JAMES H. THARP, DECEASED,

COMPLAINANT,

VS.

RUTH LIDDELL THARP, ET AL,

DEFENDANTS.

FILED
DEC 7 1970
JEWEL REDDEN, ACTING CLERK

SHELBY EQUITY

For Complainants:

C. M. Murphy for Mrs. Frankie Tharp McKown, Memphis, Tennessee.

For Defendants:

Ray A. Bratcher and Clifford D. Pierce, Jr., Memphis, Tennessee, for Complainant below.

John M. Heiskell and James S. Gilliland, Memphis, Tennessee, for Ruth Liddell Tharp.

Phil M. Canale, Jr., District Attorney General, and Eugene C. Gaerig, Assistant District Attorney General, for State of Tennessee.

O P I N I O N

Mrs. Frankie T. McKown and her solicitor C. M. Murphy, filed their motion herein on September 4, 1970, in which they move the Court to (1) set aside and vacate the original decree of the Chancellor; (2) to vacate the decree of the Chancellor refusing to award solicitor's fees and expenses; (3) to vacate the decree of the Court of Appeals upon its published opinion, 58 Tenn. App. 362.

430 S. W. 2d 787; (4) to vacate the order of the Supreme Court refusing to grant certiorari to review said published opinion of the Court of Appeals; (5) to vacate the order of the Supreme Court granting certiorari to review the decree of the Court of Appeals awarding solicitor's fees and expenses; and (6) to vacate the decree of the Supreme Court reversing the Court of Appeals decree, and for cause of said motion show; (in substance)

That the controversy arose out of a will which was prepared for decedent, Tharp, by the late Judge Preston Battle, at a time before he was appointed a criminal judge of Shelby County. That when the case was tried before Chancellor Charles Rond, Judge Battle was a criminal judge. Prior to the trial Mrs. McKown requested Judge Battle to confer with her about testator's intent with reference to the residuary trust, but he refused to do so. At the hearing the administrator testified that Judge Battle did discuss the will with him. That after the case was tried and taken under advisement by Chancellor Rond, Judge Battle and the Chancellor conversed with each other and talked about the will will and residuary trust out of the presence of and without the knowledge of these movents, and that the original opinion and decree of the Chancellor was based upon some of the argument and opinions advanced by Judge Battle. That, therefore, the constitutional rights of movents have been violated in that the Chancellor heard evidence and arguments which movents were not afforded an opportunity to challenge under Articles 8 and 17, Section 1, of the Constitution of Tennessee, and the Fourteenth Amendment to the United States Constitution.

That after the case was heard by the Court of Appeals (Western Section) and taken under advisement, movents are informed and verily believe that during the five month period the Court had the case under advisement, Judge Bejach and Chancellor Rond did talk and converse with each other about the facts and law of the cases; that Chancellor Rond thereby became an advocate before the Court of Appeals as to the merits of his opinion and decree; and movents were not afforded an opportunity to challenge or meet such facts and legal applications, and their constitutional rights were again violated.

That thereafter movents petitioned the Supreme Court for certiorari to review the decision of the Court of Appeals, "Again, the matter rested for some time in the bosom of the Supreme Court, at a time when Judge Creson and Judge Burnett were members thereof." ". . . . That during the time before certiorari was denied, Judge Burnett and Judge Creson talked about the facts and the law of the case with Chancellor Rond and with Judge Bejach, and thereupon, Chancellor Rond and Judge Bejach became advocates in support of the position they had already taken; and that such conversations and discussions influenced the Supreme Court to deny certiorari. All these conversations and arguments were done without the knowledge, information or consent of these movents, and operated to deprive them of their constitutional rights....."

"Movents further charge . . . . that Judge Creson has known about and has discussed with Chancellor Rond the decision about the solicitor's fees at a time or times after the original

Chancery Court decision, and before the Supreme Court decree reversing the Court of Appeals. . . . . These discussions violated the said constitutional rights of these movents." . . . . . ."

". . . . . For the reasons above set out, the Court was subject to influence from facts and opinions not in the record, of which these movents had no knowledge, nor opportunity to meet, rebut or argue against, and were deprived of their right to due process under the state and federal constitution".

"Wherefore, movants pray:

"1. That they be given an opportunity to adduce proof in support of this motion.

"2. That a hearing be set before this Court upon the issues raised herein, at such time thereafter as the orderly business of the court shall obtain.

"3. That all members of the Court who have participated in any decision in this case recuse themselves from acting upon this motion.

"4. That all parties to this suit be required to remain in status quo, and be enjoined not to dispose of or to commit any waste as to any property, real or personal, involved in this suit.

"5. To be allowed to present other reasons in support of this motion, if the proof so indicates.

"5. And they pray for general relief."

On October 2, 1970, Judge Joseph W. Evans filed on behalf of himself and Talmage E. Mugrage a motion "to strike their names from the motion heretofore filed by C. M. Murphy, Solicitor, and would show the Court the following facts, to wit:

> "That I discussed with C. M. Murphy filing a motion to retax the cost in the above styled cause; that no other allegations in said motion were discussed; that I did not examine said motion before it was filed.
>
> "Wherefore, movent prays:
>
> "That the name of Joseph W. Evans and Talmage E. Mugrage be stricken from said motion and not be considered on his behalf or his client."

The motion of Judge Evans and Talmage E. Mugrage is sustained, and the names of Joseph W. Evans and his client, Talmage E. Mugrage will be stricken from the motion of C. M. Murphy, et al.

First, Mrs. McKown and Mr. Mugrage style their paper filed herein on September 4, as a motion, yet, and in fact it is a second petition to rehear filed without leave of the Court. Rule 32, 218 Tenn. 826.

> "One can only determine the purpose of a suit from the pleadings."
>
> Union Tanning Co. v. Lowe, 148 Tenn. 407, 412, 255 S.W. 712, 712;
>
> Nelson v. Rural Educational Ass'n. 23 Tenn. App. 409, 134 S. W. 2d 181.

The original decree of the chancery court was rendered by Chancellor Rond in 1966, from which an appeal was perfected to the Court of Appeals and determined by that court on December 15,

1967. Certiorari was denied by the Supreme Court, July 5, 1968. The opinion of the Court of Appeals appears in 58 Tenn. App. 362, 430 S. W. 2d 787. These decrees are now final.

In Hethcoat v. State, 213 Tenn. 563, 566, 376 S. W. 2d 478, it is said:

> ". . . . This Court, as well as other courts of lower jurisdiction, lose control or jurisdiction over its final judgments when the term is ended or when there has been an expiration of thirty days. State v. Dalton, 109 Tenn. 544, 72 S.W. 456, we consequently have no jurisdiction after final judgments have been rendered in these cases to remand them so that the trial judge might enter any other or different order.
>
> ". . . . . One of the first reported cases on this question was Anderson v. Thompson, 72 Tenn. (7 Lea) 259, wherein this Court held that a court cannot even by consent set aside, at a subsequent term, its judgment of a former term, except for a clerical mistake or inadvertance; and this can only be done by authority of §16-309 and 16-310, T. C. A., which gives the Court the opportunity to correct such error. Section 16-309 T.C.A., provides in effect that in all cases in which this Court gives a judgment or decree 'when upon the fact of the record no cause of action existed against the party, the court may, upon its own motion, vacate such judgment or decree.' The mere fact that such a statute has been on the books for more than a hundred years implies within itself that this Court has no jurisdiction to vacate or set aside a judgment as here when it is to correct a clerical error or mistake or things on the face of the record which bring into play §16-310 T.C.A. It is true that the Anderson case is a civil case as shown by State v. Dalton, supra."

The question of counsel fees and expenses were presented to Chancellor Rond, on September 20, 1968, and his decree was entered September 26, 1968. The opinion of the Court of Appeals was filed May 28, 1969. Certiorari was granted and the case set down for argument December 1, 1969. The case was presented to

this Court on April 6, 1970. Petitioners had five months after certiorari was granted to prepare their case. The matters now brought forward in the petition (called a motion by movents) could have been investigated during the five months waiting period. But petitioners preferred to rest on their oars until the Court announced its decision, and then come forward with a belated effort to charge that some of the justices on the Court were disqualified to hear the case. If any member of the Court were disqualified to participate in the hearing, such incompetency was waived by failure of petitioners or movents to make objection in limine on the hearing and petitioners are conclusively presumed to have consented to his or their participation in the hearing. Wroe v. Greer, 32 Tenn. 172, (2 Swan); Crozier v. Goodwin, 69 Tenn. 125; Grundy County v. Coal Co., 126 Tenn. 94 Tenn. 325, 29 S. W. 116; In re Cameron, 126 Tenn. 662, 151 S. W. 64; Obion County v. Coulter, 153 Tenn. 469, 480, 284 S. W. 372.

As stated the first item of the prayer of the motion (petition) is "That they be given an opportunity to adduce proof in support of this motion." The second item of the prayer of the petition is "That a hearing be set before this Court upon the issues raised herein . . .". A rather unique and novel proposal since this Court is a court of appellate jurisdiction only. T.C.A. §16-304; Simms v. Dougherty, 186 Tenn. 356, 210 S. W. 486; Railroad v. Byrne, 119 Tenn. 278, 104 S. W. 460; In re Bowers, 137 Tenn. 193, 192 S. S. 919.

In re Bowers, supra, it is said:

> "Section 2 of Article 6 of the State Constitution provides that the jurisdiction of the Supreme Court shall be appellate only . . ."
>
> "This section of the Constitution has been construed in many cases, and the holdings of this Court have been uniform to the effect that it is without original jurisdiction in any matter, and that it is beyond the power of the legislature to confer original jurisdiction upon it. King v. Hampton, 3 Hays, 59; Miller v. Conlee, 5 Sneed, 432; State v. Bank, 5 Sneed, 577; State v. Sneed, 105 Tenn. 711, 58 S. W., 1070; Railroad v. Byrne, 119 Tenn. 278, 104 S. W. 460; State ex rel v. Hebert, 127 Tenn. 240, 154 S.W. 957; State v. Gamaway, 16 Lea 130."

The petition (called a motion) ". . . charges as a fact that the two members (Mr. Chief Justice Burnett and Mr. Justice Creson) who refused the first certiorari had become convinced as to their conclusion of the issues, and upon facts and information and opinions not presented to this Court when the second application for certiorari was granted, that they influenced the entire Court to their opinion."

Before the case was presented to the Court Mr. Chief Justice Burnett had retired, so he was not on the Court. The sole and only action taken by Mr. Justice Creson was to concur in the opinion of the Court. Mr. Justice Creson made no statement before the case was determined as to how it should be decided.

> "It is exceedingly easy for litigants and counsel to imagine that a Judge is prejudiced against a party, or against his counsel, who has failed to successfully prosecute, or successfully defend, any one or more cases. It is an infirmity of human nature that counsel, whose feelings and

personal interests are deeply enlisted in every important case they try, are frequently unable to attribute want of success to the inherent weakness of the case, or their own shortcomings in the management of it. It is a matter of general knowledge among lawyers that the refuge of defeated counsel is far too often abuse of the Court, referred to pithily by lawyers as 'cussin the Court'. When the tide turns, and success crowns the efforts of previously disappointed counsel, his opinion of the intelligence, learning, and probity of the Court experiences a high, upward tendency."

In re Cameron, 126 Tenn. 614, 650, 151 S. W. 64.

In Chumbley v. People's Bank & Trust Co., 165 Tenn. 655, 57 S. W. 2d 787, this Court said:

". . . . . The interest which disqualifies a Judge is a direct pecuniary or property interest, or one which involves some individual right in the subject matter of the litigation, whereby a liability or pecuniary gain must occur on the event of suit. Ex parte Alabama State Bar Association, 12 L.R.A. 136; 33 C.J. p. 993, Sec. 135, p. 994 Sec. 137."

The Court in Winter v. Allen, 166 Tenn. 281, 62 S. W. 2d 51, had this to say:

"The rule is well settled in this state, certainly in civil cases, that a party may waive the incompetency or lack of authority to act of the trial judge, and does so waive it by implication when no objection is made at the trial and in the trial court. As said by Judge Freeman in Crozier v. Goodman, 1 Lea, 128, 'It would be monstrous to allow a party to acquiesce in the action of such a court without objection, and then, on appeal, show the fact as ground for reversal.' See Wroe v. Greer, 2 Swan, 172; Holmes v. Eason, 8 Lea, 754; Pasey v. Eaton, 9 Lea 501."

The same rule would apply in this Court.

Counsel state in their petition that:

"The constitutional rights of these movents have been violated thereby in that the chancery court has heard evidence and arguments which these movents were not afforded an opportunity to challenge or argue against. Art. 8 and 17, sec. 1, Constitution of Tennessee; 14 Amendment, United States Constitution."

We presume he meant Article 1, sections 8 and 17. Counsel and his client have had the process of the chancery court, the Court of Appeals and the Supreme Court, all legally constituted.

The constitution prescribes that this Court shall be composed of five Judges: yet the same instrument prescribes that the concurrence of three shall make a constitutional judgment. Article VI, sec. 2; Radford Trust Co. v. Lumber Co. 92 Tenn. 126, 138, 21 S. W. 329. Neither Mr. Justice McCanless, who had only been on the Court three months when the petition for certiorari was granted December 1, 1969, nor Mr. Special Justice Jenkins nor the Special Justice who prepared the opinion for the Court, ever heard of the case until it was argued and presented to the Court on April 6, 1970, so these three justices could, and did, make a constitutional judgment in the case.

Every lawyer, worthy of respect, realizes that public confidence in our courts is the cornerstone of our governmental structure, and will refrain from unjustified attack on the character of the judges. Kentucky State Bar Ass'n v. Lewis, 282 S. W. 2d 321, 326. And, it is the duty of the lawyer to maintain towards the Court a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its

supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Canons of Professional Ethics, American Bar Association, p. 116.

The second petition to rehear or motion, as it is called, is dismissed at the cost of petitioners, C. M. Murphy and Mrs. Frankie T. McKown.

W. J. SMITH, SPECIAL JUSTICE

Concurring:

Dyer, C. J.,
Creson, J., - Not participating.
McCanless, J.,
Jenkins, S. J.

THE STATE OF TENNESSEE

I, JEWEL REDDEN, Clerk of the Supreme Court of said State for the Western Division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of

the OPINION

pronounced by said Court at its April Term, 1970 in the case of

CLIFFORD D. PIERCE, JR., ETC. against

RUTH LIDDELL THARP, ET AL

as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in the City of Jackson, on this, the

23rd day of February A. D., 1971

Jewel Redden Clerk

By

LAYCOCK, JACKSON, TENN.

CHIEF JUSTICE
ROSS W. DYER

ASSOCIATE JUSTICES
CHESTER CHATTIN
LARRY CRESON
ALLISON B. HUMPHREYS
GEORGE F. MCCANLESS

Supreme Court
State of Tennessee
Jackson 38301

JEWEL REDDEN
CLERK

February 23, 1971

Mr. C. M. Murphy
Attorney at Law
Dermon Building
Memphis, Tennessee 38103

RE: CLIFFORD D. PIERCE -vs- RUTH LIDDELL THARP

Dear Mr. Murphy:

I am enclosing herewith copy of judgment filed on May 28, 1970, in the above styled case; also copy of the opinion filed on December 7, 1970.

I note in your letter that you asked for a copy of the final judgment upon the Supreme Court's opinion filed on December 7, 1970. We do not show that a judgment was filed after this opinion of December 7, 1970, was released. Inasmuch as this opinion was on a Petition to Rehear and it was denied, I feel that the judgment that was filed May 28, 1970, would be all that is necessary.

With best wishes, I remain,

Sincerely,

Jewel Redden

Jewel Redden, Clerk

JR:sg

Enclosures